U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 December 2003

CASE NO.: 2002-LHC-2122

OWCP NO.: 07-105398

In the Matter of:

CHRISTOPHER HEAVIN,
Claimant,

vs.

CHEVRON USA, INC.,
Employer,

and

CRAWFORD & COMPANY,
Carrier.

APPEARANCES:

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For the Claimant

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For the Employer/Carrier

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER GRANTING PERMANENT TOTAL DISABILITY BENEFITS

INTRODUCTION

This matter involves a claim for disability benefits filed by the Claimant, Christopher Heavin, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. ("the Act"), for a determination of permanent total disability arising from industrial injuries suffered on October 13, 1986, when Claimant fell 40 feet from an offshore drilling platform while working for Chevron USA. (HT, p. 97-98; CX 2, p. 107.) The Claimant seeks an order setting forth the Employer's responsibilities respecting his medical care, and establishing the industrial basis of his injuries and conditions, and the Employer's responsibility to provide medical screening and treatment. This proceeding was initiated under the Act on June 13, 2002, when it was referred to the Office of Administrative Law Judges for formal hearing.

For the reasons set forth below, the Claimant is granted permanent total disability benefits.

PROCEDURAL BACKGROUND

This matter was heard in San Diego, California, on March 11, 2003. The Claimant, his counsel, Eric A. Dupree, and the Employer's and Carrier's counsel, James P. Aleccia, all appeared and participated in the trial.

At the trial, the Claimant's Exhibits ("CX") 1-14, 15 (except for page 263A), 16 (pages 354-58 only) and 17-23 were admitted. The Employer's exhibits ("EX") 1-11, 13-20, and 22-23 were also admitted. The Employer's Exhibit 12 was withdrawn. In post-trial rulings, the Claimant's Exhibit 24 and the Employer's Exhibits 24-28 were admitted. However, the Employer's Exhibit 21 was excluded.

The Claimant was receiving temporary total disability benefits from the Employer until January 6, 1996, when the Employer, after reviewing a Labor Market Analysis conducted by Crawford & Company, shifted the Claimant to temporary partial disability status. The Claimant filed a workers' compensation claim with the Office of Workers' Compensation Programs on June 4, 2002, and on June 13, 2002, the District Director referred the matter to the U.S. Department of Labor, Office of Administrative Law Judges, for a formal hearing.

ANALYSIS AND DISCUSSION

Issues:

The following issues are pending in this case:

1. When did the Claimant reach maximum medical improvement (MMI)?
2. What is the nature and extent of the Claimant's disability?
3. What was the Claimant's average weekly wage?
4. Is the Employer entitled to § 8(f) relief?
5. Is the Claimant entitled to reimbursement for the Interferon treatment he received?

Factual Background

The Claimant, who was born in 1953, began working in the oil industry in June 1976, on the day he graduated from college.[1] (HT[2], p. 79-80.) His first job was with Pittsburg and Midway Coal Mining Company, a subsidiary of Gulf Oil. (HT p. 85.) He worked at Pittsburg and Midway until November 1981, and during that time worked his way up from sample carrier to production operator. (HT, p. 85.)

The Claimant next worked as an environmental and safety engineer with the Exploration and Production Company, another subsidiary of Gulf Oil, where he remained until January 1984 (HT, p. 88.) In 1984, the Claimant was transferred offshore to continue his duties as an environmental and safety engineer and also to work as a production person. (HT, p. 89.) He reached the highest level of production manager, a position referred to as "pumper gauger" in Chevron terminology, and then was promoted to the position of lease operator, referred to as "facility operator" in Chevron terminology, shortly after Gulf Oil merged with Chevron. (HT, p. 90-91.) It was in this position of facility operator that the Claimant was injured on October 13, 1986 (HT, p. 5), when he fell approximately 40 feet from an offshore drilling platform (HT. p. 97; CX 2, p. 107) and suffered a bruised heart, fractured ribs, fractured back (HT, p. 19; CX 11, p. 218; EX 19, p. 956), fractured hip (HT, p. 6), fractured right femur, ruptured spleen, (HT, p. 19; CX 11, p. 218), punctured lungs, punctured diaphragm, injured liver (HT, p. 101; EX 19, p. 956), and laceration of his only kidney. (HT, p. 101; CX 11, p. 218; EX 19, p. 956.)

Once the Claimant had stabilized at the hospital, specialists were called to perform multiple surgeries. Dr. Robert Carter repaired the hole in the Claimant's diaphragm and inserted a chest tube. (EX 19, p. 956.) Dr. Andrew King reconstructed the Claimant's fractured back by wiring a Harrington rod to his spinal column. (CX 12, p. 221-22; EX 19, p. 954-55.) Dr. William M. Pusateri repaired the Claimant's fractured leg with a metal plate fixation. (CX 13, p. 223.) Dr. E.H. Goodier treated the Claimant's kidney problems. (EX 19, p. 956.)

The Claimant received approximately 48 blood transfusions as a result of blood lost from internal bleeding (CX 14, p. 229) and was treated with hemodialysis in order to restore his left kidney's function. The Claimant's right kidney had been removed prior to the date of the injury, as a result of a congenital deformity. (EX 18, p. 735; EX 8, p. 208; EX 17, p. 735.) The Claimant also received regular psychological counseling in the hospital because of his resistance to the dialysis procedure. (CX 14, p. 229.)

[1] Mr. Heavin testified that he went to work the day of his college commencement to "make money rather than stand in line in a gown and robe…"
[2] References to "HT" are to the trial transcript.

After the Claimant recovered in the hospital from October 13, 1986 to December 29, 1986 (EX 19, p. 961), he returned to his home in Lafayette, Louisiana, where he was treated by various doctors for his multiple injuries. (HT, p. 103.) One of the Claimant's treating doctors, Dr. Louis C. Blanda, monitored the fusion in the Claimant's back. After examining the Claimant on February 19, 1987, Dr. Blanda commented on the Claimant's future employability that "light duty work would be his major goal." (CX 10, p. 216.)

In January 1988, the Claimant moved to San Diego, California, near his sister, after learning that he could obtain better medical attention there. (HT, p. 104.) When the Claimant's pain persisted, he asked nurses from Tri-Cities Medical Center to suggest a back doctor for him. (HT, p. 106.) They strongly recommended Dr. Raymond J. Linovitz, a spine specialist. (HT, p. 106.) Thereafter, Crawford & Company, Chevron's Insurance Carrier, approved Dr. Linovitz as the Claimant's treating specialist (HT, p. 107) and sent Dr. Linovitz a referral notification. (CX 24, p. 6.)

On July 6, 1988, the Claimant was first evaluated by Dr. Linovitz. (CX 2, p. 97.) On the first visit, Dr. Linovitz examined the Claimant and found him to be asymptomatic. However, the Claimant returned to Dr. Linovitz approximately ten days later, after doing some volunteer work, with an onset of pain. (CX 2, p. 94.) The Claimant described the pain in his back as radiating down into his rectum, and down his right leg toward the foot, causing his right leg to feel weak and to cramp. (CX 2, p. 75, 94.) Dr. Linovitz scheduled an emergency myelogram, which showed a complete block at L1-2 and narrowing disc space. (CX 2, p. 92.) Dr. Linovitz then immediately scheduled surgery to correct the problem.

On July 29, 1988, Dr. Linovitz conducted a preoperative evaluation of the Claimant and scheduled surgery for the following week to remove the Claimant's Harrington/Luque instrumentation and explore his L1-2 region. However, prior to the August 1, 1988 surgery date, the Claimant's liver function tests showed severely elevated liver enzymes and the surgery was postponed until August 9, 1988. (EX 19, p. 921, 1005.)

On August 9, 1988, Dr. Linovitz performed the surgery on the Claimant, removing the Harrington-Luque instrumentation from his back and inserting a cerebrospinal fluid shunt. (CX 2, v. 1, p. 100.) Dr. Linovitz also repaired the Claimant's pseudoarthrosis.[3] (CX 2, v. 1, p. 100.) Dr. Linovitz explained to the Claimant that he found that the screws and bailing wire in the Claimant's back had slipped so that the wire was cutting into the Claimant's spinal column and causing him pain. (HT, p. 111.) More precisely, one of the sublaminar wires placed during the original surgery had caused erosion of the covering of the spinal cord, causing a hole in the dura and chronic scarring down to the bony canal. (CX 24, p. 8.) Dr. Linovitz's post-operative diagnosis explained that the Claimant suffered from arachnoiditis at L1-2. (CX 2, p. 100.)

Arachnoiditis is chronic inflammation and thickening of the middle layer of the three meninges (membranes that cover and protect the spinal cord). (CX 24, p. 12.) The middle layer, referred to as the arachnoid, is a thin vascular layer that, with trauma or as a result of a procedure

[3] Although Dr. Linovitz's report used the spelling "pseudoarthrosis" in this instance, rather than "pseudarthrosis" as in his earlier report, he refers to the same condition.

such as a myelography,[4] becomes inflamed and scarred. (CX 24, p.12 .) The nerve roots in the arachnoid area become clumped in a way that nothing can flow through. (CX 24, p. 12.) Currently, there is no effective treatment for arachnoiditis. (CX 24, p. 12.)

Aside from the Claimant's arachnoiditis, X-rays taken of the Claimant on September 30, 1988, showed persistent right thoracolumbar scoliosis of 15 degrees. (CX 2, p.77.) Two months later, on November 28, 1988, another set of X-rays showed persistence of the post-traumatic scoliosis. (CX 2, p.77.) On February 2, 1989, X-rays showed the post-traumatic scoliosis had increased from 17 to 22 degrees. (CX 2, p. 78.) From these findings, Dr. Linovitz concluded on June 1, 1989, that since the Claimant's 1988 surgery, he had developed a progressive spinal deformity at the L1-2 area with scoliosis and lateral listhesis. (EX 19, p. 994.)

On February 24, 1989, Dr. Linovitz issued a medical report clarification wherein he explained that his opinion regarding the Claimant's employability had changed due to the Claimant's worsening condition. Dr. Linovitz explained that on July 6, 1988, he first believed that the Claimant was employable in a "very sedentary type of position." (CX 2, p. 70.) However, after the Claimant returned on July 22, 1988, with severe cauda equine syndrome and progressive neurologic deficit, Dr. Linovitz found the Claimant to be totally unemployable. (CX 2, p. 70.) After Dr. Linovitz performed surgery on the Claimant and a follow-up appointment on February 2, 1989, he found that the Claimant was "perhaps capable of only very sedentary employment." (CX 2, p. 72.)

On March 30, 1989, Dr. Linovitz explained in a medical report that the Claimant suffers from continuing difficulty due to arachnoiditis and probable pseudoarthrosis. (CX 2, p. 68.) Further, in Dr. Linovitz's deposition, he explained that the second fusion performed in the 1988 surgery hadn't healed correctly and that another surgery would likely be necessary in the future. (CX 24, p. 9) On April 21, 1989, the Claimant described discomfort in his right leg and numbness in his left leg, which led Dr. Linovitz to conclude he was suffering from significant pseudarthrosis and progressive instability. Dr. Linovitz found that surgery was necessary in order to increase the Claimant's chances of fusion and correction of the deformity. (CX 2, p. 66.) On May 8, 1989, Dr. Linovitz reported that the Claimant had a significant block at the L1-2 level, due to arachnoiditis and/or his deformity. (CX 2, p. 67.)

The Claimant's next surgery took place on June 1, 1989, after Dr. Linovitz determined that the Claimant's scoliosis had increased to 32 degrees (EX 19, p. 996) and that the Claimant had developed an established pseudoarthrosis at L1-2 with progressive lateral listhesis. (CX 2, p. 58.) Dr. Linovitz performed a two-stage operation wherein he first cut through the Claimant's chest to do a bony fusion in the front of his spine and next cut through the Claimant's back, where he stabilized the spine with metal and placed bone graft. (CX 24, p. 9.) The surgery consisted of anterior diskectomies, anterior fusion, harvesting of crest bone grafts, pedicle screw instrumentation and fusion (CX 2, v. 1, p. 58; HT, p. 417), and removal of the plate in the Claimant's right leg. (CX 2, p. 55.)

[4] A myelography is an injection of radiopaque dye into the spinal canal followed by X-rays.

On July 14, 1989, Dr. Linovitz examined the Claimant and found his recovery to be in order. (CX 2, p. 51.) X-rays taken during the doctor's visit revealed that the Claimant's scoliosis curve was reduced from 32 degrees to 22 degrees. (CX 2, p. 51.)

On August 25, 1989, X-rays showed that the surgery was successful and that the Claimant was maintaining the alignment and fixation as well as consolidating his bone graft. (CX 2, p. 49.)

On October 6, 1989, Dr. Linovitz reported that the Claimant's scoliosis curve remained at 19 degrees (the same as it was on his August 29, 1989 doctor's visit) but that the Claimant's fusion was not solid. (CX 2, p. 48.) The Claimant complained of a pinching sensation in his left thigh. (EX 2, p. 48.)

On November 17, 1989, X-rays showed that the Claimant's scoliosis curve had decreased to 17 degrees, but that his fusion still was not solid. (CX 2, p. 48.) In addition, the Claimant still complained of a pinching sensation in his left thigh. (CX 2, p. 48.)

On January 5, 1990, X-rays showed the Claimant's scoliosis to be stable at 20 degrees and his fusion to be solidifying, but not solid. (CX 2, p. 47.)

On April 6, 1990, Dr. Linovitz reported that the Claimant's rods were holding well and that there was no loss in fixation and no increase in deformity. (CX 2, p. 47.) However, Dr. Daniel M. Pertschuk, who was also monitoring the Claimant, stated that the Claimant suffered from a metabolic bone disease that was hindering the solidifying process of the fusion. (CX 2, p. 46-47.)

On July 10, 1990, X-rays of the Claimant showed no increase in his deformity. In addition, the Claimant's fusion finally appeared to be solid and the fixation intact. (CX 2, p. 43.)

On January 11, 1991, the Claimant complained to Dr. Linovitz of minimal back pain and continued numbness in his left leg. (CX 2, p. 42.)

On March 2, 1992, the Claimant was evaluated by Dr. Clyde Beck, a nephrologist, who noted that the Claimant had a small left inguinal hernia in addition to the traumatic damage to his left kidney. (CX 14, p. 252.)

On January 27, 1993, although the Claimant complained of back discomfort, X-rays showed his fixation to be solid, his fusions to be healed and his scoliosis to be stable at 19 degrees. (CX 2, p. 39.)

On February 2, 1993, the Claimant was evaluated by Dr. Carlos A. Perosio, a psychiatrist. Dr. Perosio found the Claimant's retention and recall, as well as his reading ability, to be impaired (CX 8, p. 211.) He also found the Claimant to have severe learning disabilities and difficulties with mathematics, concentration, and repetitive tasks. (CX 8, p. 210-11.) Specifically, Dr. Perosio found that the Claimant could not keep pace, persist or complete a task. (CX 8, p. 211.)

On February 4, 1994, the Social Security Administration issued a decision awarding the Claimant disability insurance benefits under sections 216(i) and 223 of the Social Security Act. (CX 1, p. 1-7.) The ALJ noted that the Ninth Circuit Court of Appeals had already found the Claimant to be disabled from October 13, 1986 through October 13, 1987, but that the Social Security Administration decision determined the Claimant to be "disabled from October 14, 1987 through the present." (CX 1, p. 7.) In rendering the decision, the ALJ took into consideration multiple factors including that the Claimant had "severe multiple traumatic injuries necessitating surgery, an organic mental disorder, [and] an affective disorder." (CX 1, p. 6.)

In addition, the ALJ considered the following testing results from various specialists: the psychological testing results of Sara Arroyo, PhD, who found the Claimant unable to sit and concentrate for more than an hour (CX 1, p. 4.); the consultative examination results of Dr. Perosio, a psychiatrist, who found that the Claimant had no ability to maintain attention and concentration due to severe learning disabilities (CX 1, p. 4.); and the consultative examination results of Dr. Stanley Terman, a psychiatrist, who diagnosed a dysthymic disorder that would prevent the Claimant from handling even a low stress job. (CX 1, p. 4; CX 7, p. 206.) The ALJ further considered the expert medical testimony of Timothy McManus, PhD, who found the Claimant to suffer from dysthymia, as well as an organic mental disorder with memory impairment and perceptual and thinking disturbances. (CX 1, p. 4.)

After reviewing the above-mentioned opinions, the ALJ found that "the claimant's mental condition has precluded his ability to perform even simple and repetitive task-type employment on a sustained basis since the onset date through the present." (CX 1, p. 6.) The ALJ further stated that even though the Claimant's physical condition improved in February 1989, that "nonetheless, the claimant's severe and disabling mental impairments render the claimant unable to perform any substantial gainful activity on a sustained basis (20 CFR 404.1572)." (CX 1, p. 6.) Further, the ALJ stated that "Considering his maximum sustained work capability, age, education, and work experience, there are no other jobs the claimant is capable of performing which exist in significant numbers in the national economy." (CX 1, p. 6.)

On June 8, 1995, pursuant to a request by Crawford & Company, Dr. Linovitz conducted an examination of the Claimant. Dr. Linovitz reported that the Claimant continued to have difficulty with low back pain, pins and needles sensations in his anal region, numbing of his left, lower leg, abnormal sexual function and impaired renal function. (CX 2, p. 35.) X-rays taken during the visit showed the Claimant's residual scoliosis to persist. (CX 2, p. 36.) Dr. Linovitz also explained that the Claimant had "constant moderate discomfort in his back and lower extremities with *worsening* intermittent discomfort and dysesthesias[5] involving his anal region and leg." (CX 2, p. 36.) (emphasis added)

In response to a June 5, 1995 request by Crawford & Company for Dr. Linovitz to report whether the Claimant was considered permanent and stationary at the time of the scheduled June 8, 1995 examination, Dr. Linovitz replied that the Claimant was indeed considered permanent and stationary. (CX 2, p. 36.) Dr. Linovitz further stated on June 8, 1995, that "Mr. Heavin has

[5] Dysesthesias refers to the impairment of sensitivity.

disability resulting in limitation to sedentary work. It contemplates he can do work predominantly in a sitting position at a bench, desk or table with a minimum demand for physical effort and with some degree of walking and standing being permitted." Although he stated that the Claimant was capable of working, Dr. Linovitz explained to Ann Mueller, an RN from Crawford & Company, who accompanied the Claimant to the appointment, that he could not think of a job that would be suitable for the Claimant. (HT, p. 115.)

On February 13, 1997, the worsening intermittent discomfort and dysesthesias involving the Claimant's anal region and leg (mentioned above during the June 8, 1995, visit), indeed worsened. The Claimant complained that his back pain was worse and that he suffered tingling and burning sensations down his left leg. (HT, p. 116.) According to Dr. Linovitz's report:

> Apparently since [the June 8, 1995] evaluation, at which time I said he could do only sedentary employment, he has worsened. His sitting tolerance without back and/or left leg symptoms, is no more than 15 or 20 minutes, at which point he must get up and walk around or lie down. Almost all activities such as bending, stooping and lifting exacerbate his back and his left leg symptomatology. He still has difficulty with his bowels and has bowel urgency and sometimes will soil himself if he doesn't get to the bathroom very quickly.

(CX 2, p. 32.) Dr. Linovitz noted that the Claimant's bowel urgency resulted from partially resolved cauda equine syndrome. (CX 2, p. 33.) After reviewing the Claimant's condition during the February 13, 1997 appointment, Dr. Linovitz concluded that the Claimant was unable to participate even in sedentary work. (CX 2, p. 33.) He further noted his concern that if the Claimant's pain continued to increase, he could require spinal cord stimulation or use of an epidural or Morphine pump. (CX 2, p. 33.) At this same appointment, Dr. Linovitz referred the Claimant to Dr. Dominick Addario, a psychiatrist, for a psychiatric/psychological evaluation. (CX 2, p. 33.)

On April 15, 1997, Dr. Addario began the first of a three-day comprehensive neuropsychiatric evaluation of the Claimant. (HT, p. 232.) Dr. Addario found that, as a result of the October 13, 1986 injury, the Claimant suffered a mild traumatic brain injury associated with deficiencies in mathematical function, reasoning, deductive ability and short-term memory, as well as impairments in resiliency, increased irritability, and aggravation and magnification of obsessive-compulsive and avoidant behaviors. (CX 20, p. 542.) In his report dated June 25, 1997, which summarized the three-day testing, Dr. Addario noted that the Claimant suffered from pre-existing, nonindustrial, dyslexia affecting his verbal functioning. (CX 20, p. 543.) In fact, Dr. Addario found that the Claimant, with all of his conditions combined, was most likely totally disabled. (HT, p. 214.)

In 1997, the Claimant was seen by Dr. Robert W. Steiner, who took a blood test and found that the Claimant's liver problem was persisting. (HT, p. 131.) Dr. Steiner referred the Claimant to Dr. Tarek I. Hassanein who performed a liver biopsy and found the Claimant's liver to be degraded (HT, p. 132) and inflamed with hepatic activity, thereby indicating that the

Claimant was positive for the Hepatitis C virus. (CX 5, p. 196.) Shortly after receiving the results from the liver biopsy, Dr. Hassanein prescribed Interferon for treatment. (HT, p. 138.) When the Claimant had his prescription filled, the authorization from Crawford & Company failed to go through, so the Claimant paid for the prescription, in the amount of $1,976.29, on his credit card. (HT, p. 141-43; CX 16, p. 355.) When the authorization for the Interferon *never* came through, the nurses at University of California San Diego Medical Center continued to provide Interferon to the Claimant at no cost, by using Interferon that had been returned to the Medical Center by patients who could not tolerate the effects of the drug. (HT, p. 143.)

On May 29, 1998, Dr. Steiner issued a medical report stating that the use of Interferon causes a flu-like condition. (CX 3, p. 122.) Dr. Steiner further explained that, due to the Claimant's Hepatitis C, at some point he will lose stamina and will not be able to work up to normal capacity. (CX 3, p. 122.) He explained that "a typical course of hepatitis C liver disease is progressive liver failure, leading to total disability." (CX 3, p. 122.) In other words, Hepatitis C is a full progressive disease that frequently gives rise to liver failure and the need for liver transplantation. (CX 19, p. 518F.)

On August 19, 1998, at the request of the Employer's counsel, James Aleccia, the Claimant was evaluated by Dr. Jerome H. Franklin, a psychiatrist. Dr. Franklin found that although the Claimant demonstrated a history of mild cognitive dysfunction, that if he were motivated, he could be gainfully employed at some sedentary position. (EX 9, p. 267.) Dr. Franklin stated that the Claimant did not have a diagnosis of clinical anxiety or depression, but then suggested a trial of antidepressant medication such as Prozac or Zoloft to give him a greater sense of control over his emotions. (EX 9, p. 267-68.)

On August 24, 1998, the Claimant was examined by Dr. James T. London, an orthopedic surgeon. The Claimant reported that he had constant, sharp, stabbing pains in his lower spine and that he felt a stabbing sensation in that area whenever soft tissue moved over the rods. (EX 7, p. 169.) In addition to other complaints listed in the medical report, Dr. London reported that the Claimant suffered constant numbness in his entire left lower extremity, radiating distally into all five toes of his left foot, constant pins and needles sensation in the groin area, and a feeling of urgency before making a bowel movement. (EX 7, p. 170.) Dr. London testified that he saw no reason to doubt the Claimant's credibility (EX 24, p. 35) and therefore considered his pain complaints credible. (EX 24, p. 37.)

On September 8, 1998, again at the request of James Aleccia, the Claimant was evaluated by Charles Furst, a neuropsychologist. The Claimant's symptoms included memory dysfunction and every day memory lapses including misplacing possessions and forgetting phone numbers. Dr. Furst gave the Claimant a series of tests and reported problematic results in the following testing areas: 1) Complex attention and freedom from distractibility 2) rapid mental processing speed 3) memory dysfunction and 4) mathematical abilities. (EX 10, p. 307.) Dr. Furst concluded that the Claimant suffered from a slight additional disability on the basis of his head residuals, however, he concluded that the Claimant's neurocognitive defects would still not prevent him from performing in the competitive job market. (EX 10, p. 309.)

On October 7, 1998, the Claimant was evaluated by Dr. Paul J. Grodan, an internist and cardiologist, who stated "There is no question Mr. Heavin has a renal impairment." He attributed the Claimant's renal impairment partially to his pre-existing right nephrectomy[6] and partially to his October 13, 1986 injury which caused him also to have part of his left kidney removed. (EX 8, p. 208.) However, Dr. Grodan explained that even though the Claimant has an elevated creatinine level of 2.9, and is operating on a small residual kidney, this renal impairment does not limit the Claimant from employment, as his orthopedic injuries do. (EX 8, p. 208-09; CX 19, p. 518B; EX 25, p. 31.)

On July 13, 1999, the Claimant met with Chevron USA, Inc. and Crawford & Company for an informal conference before Linda Myer, a Claims Examiner for the Office of Workers' Compensation Programs of the U.S. Department of Labor. The Claims Examiner issued a recommended opinion that stated the Claimant's Average Weekly Wage ("AWW") should be $864.99 as claimed, thereby producing a compensation rate of $576.94 per week. (CX 14, p. 231.) The opinion further recommended that the Claimant be authorized to seek psychological treatment for his ongoing depressive disorder and that he be provided authorization for all requested medical evaluations and reimbursement for out of pocket expenses. (CX 14, p. 231.)

On July 29, 1999, when the Claimant was examined by Dr. Linovitz, he complained of worsening back and leg pain, an increasing sensation of numbness in both legs, and increasing urinary frequency. Dr. Linovitz then took X-rays, which showed that the Claimant had scoliosis and degenerative changes from L3-L5. (CX 2, p. 25.) Dr. Linovitz directed correspondence to Crawford & Company explaining the Claimant's condition and indicating that the Claimant's latest myelogram and post myelographic CT scan, done in 1998, showed a complete block due to arachnoiditis, and that the Claimant was still having symptoms. (CX 2, p. 28.)

On October 15, 1999, Dr. Hassanein reported that the Claimant responded very well to the Interferon that he was prescribed for his Hepatitis C. (CX 5, p. 193.) However, after the end of the therapy, he had a relapse with re-emergence of the virus. (CX 5, p. 193.) The Claimant was then instructed to restart Interferon treatment every other day for a year. (CX 5, p. 193.) Dr. Hassanein further noted that the Claimant is a kidney transplant candidate but that the use of Interferon post kidney transplant could cause rejection. (CX 5, p. 193.)

On February 8, 2001, the Claimant was seen by Dr. Steiner at the UCSD Medical Center for chronic renal failure, hypertension, calcium phosphorus status and Hepatitis C status. (EX 18, p. 735.) Dr. Steiner reported that the Claimant has about one-third of his left kidney remaining, which supplies all of his kidney function. (EX 18, p. 735.) Dr. Steiner opined that the Claimant faces the risk of deteriorating kidney function. (EX 18, p. 735.)

On February 11, 2001, Dr. Addario evaluated the Claimant again during a two-hour face to face appointment. (CX 20, p. 545.) Dr. Addario found that the Claimant continued to demonstrate evidence of a mild cognitive deficit as well as a mood and anxiety disorder. (CX 20, p. 551-52.) Dr. Addario further stated that "The combination of metabolic factors, pain disorder, and cognitive disability render him marginally employable on a psychiatric basis, and it

[6] A nephrectomy is the surgical removal of a kidney.

is my impression, unemployable with a total disability when one combines all psychiatric, medical, metabolic, and orthopedic factors." (CX 20, p. 551.)

On March 6, 2001, Dr. Linovitz examined the Claimant, who complained of aching and burning in his lower back and tingling and burning in his left groin. (CX 2, p. 20.) He also complained of numbness, coldness and burning in his left foot combined with a weak sensation in his left leg. (CX 2, p.20.) Dr. Linovitz reported that the Claimant's most comfortable position was lying on his side with a pillow between his legs. Dr. Linovitz found the Claimant's symptoms to be worsening as he only had three mobile segments in his lumbar spine, and he found the Claimant to be at great risk for developing advanced degenerative changes, stenosis and further neurologic impairment. (CX 2, p. 21.)

On March 23, 2001, the Claimant was again given a psychiatric evaluation by Dr. Franklin. The Claimant arrived late to the appointment after confusing it with another appointment with a different doctor. (EX 9, p. 281.) During the evaluation, the Claimant told Dr. Franklin that he forces himself out of the house, but that he cannot stand up for more than 15 minutes at a time, and that if he walks more than a half a mile, he cannot do anything else for the rest of the day. (EX 9, p. 278) He explained that he felt aggravated. (EX 9, p. 279.) After Dr. Franklin completed a psychiatric evaluation of the Claimant, he concluded that although the Claimant showed compulsive and schizoid personality traits (EX 9, p. 278), whatever mild deficits he might have exhibited in the past no longer appear present. (EX 9, p. 282.) Dr. Franklin emphasized that he felt Dr. Addario's reports exaggerated the Claimant's condition. (EX 9, p. 283, 288; EX 26, p. 30.)

On April 3, 2001, the Claimant was again examined by Dr. London. During that examination, the Claimant's complaints included mid back pain at the tops of his rods, constant severe back pain that is more severe on the left side, numbness and tingling over the left lower leg radiating down to the foot, and stabbing pain in his groin. (EX 7, p. 192.)

On May 7, 2001, the Claimant was again examined by Respondents' expert internist, Dr. Grodan, who found that despite the Claimant's loss of his right kidney and injury to the left, these impairments alone were not keeping him from employment. (EX 8, p. 230.) Dr. Grodan also commented that the Claimant had improved as a result of the prescribed Interferon treatment, and that he was "puzzled" that the Claimant could not obtain authorization for the second round of therapy. (EX 8, p. 229.)

On July 18, 2001, the Claimant was again examined by Dr. Linovitz, who reported a complete block in the solidly fused L1-2 area (the area of his initial injury), mild advancing degenerative changes at the L3-4 level, and minimal insignificant stenosis. (CX 2, p. 14.) Dr. Linovitz also reported that the Claimant had traumatic arachnoiditis and that the symptoms from arachnoiditis can worsen without any anatomic change. (CX 2, p. 15.) Dr. Linovitz further stated that the Claimant had been permanent and stationary since February 13, 1997, and that his disability was attributed fully to his injury on October 13, 1986. (CX 2, p. 15.)

On August 30, 2001, Dr. Steiner sent correspondence to Mr. Aleccia, the Employer's counsel, reporting on the Claimant's medical condition. He reported that the Claimant had lost

two-thirds of his remaining kidney's function, but that he was stable and would probably remain so for the next few years. (CX 3, p. 113.) He explained that the Claimant had last received Interferon treatment for his Hepatitis C condition two years ago and that the liver clinic would decide whether to recommend another course. (CX 3, p. 113.) Dr. Steiner also noted that the Claimant was suffering from spinal stenosis, which impinges upon the nerves to his legs. (CX 3, p. 113.)

On January 26, 2003, Dr. Addario reevaluated the Claimant and found some improvements in his memory function, but continued information processing difficulties and short term memory problems. (HT, p. 215.) In short, Dr. Addario found that the Claimant suffers from depression and at the very least needs antidepressant medications, anti-anxiety medications and counseling. (HT, p. 221.) He further found that, even with such treatment, the Claimant should not be expected to be employed, as his body has too many stressful conditions that could dangerously interplay. (HT, p. 221-22.) He concluded that the Claimant's psychological condition coupled with his orthopedic and the internal medicine injuries, renders him permanently and totally disabled. (HT, p. 245.)

On February 10, 2003, Dr. Thomas J. Wegman, a psychologist, reported his findings from a six-day neuropsychological evaluation of the Claimant. (CX 21, p. 567-96.) The evaluation showed the Claimant to have mild evidence of a brain disorder, which Dr. Wegman described as "subtle cognitive impairments consistent with a postconcussive injury." (HT, p. 246.)

1. When Did the Claimant Reach Maximum Medical Improvement ("MMI")?

Permanent Status Is Valid Despite Subsequent Improvement

Many federal circuit courts have held that a claimant's condition may be found permanent, even while the claimant is continuing to receive medical treatment that is intended to improve his or her condition. The first decision to pave the way to this approach was *Watson v. Gulf Stevedore Corp.,* 400 F.2d 649 (5th Cir. 1968). In *Watson*, the court held that the claimant's condition could be considered permanent despite evidence showing that, in the future, the claimant would undergo medical procedures likely to improve his condition. *Id.* at 653-54. The court explained that the statutory term "permanent" could be intended to consider an employee permanently disabled when his or her condition has continued for a long period of time, and it appears to be of lasting or indefinite duration, as opposed to a condition merely awaiting a normal healing period. *Id.* at 654.

In *Air America, Inc. v. Director*, *OWCP*, 597 F.2d 773 (1st Cir. 1979), the court followed this approach and upheld a BRB decision that a claimant's condition was permanent even though the medical evidence indicated that "some improvement had occurred and would probably continue." *Id*. at 781-82. In *Crum v. General Adjustment Bureau,* 738 F2d 474 (D.C. Cir. 1984), the court found that a condition is permanent if it has continued for a lengthy or indefinite duration. *Id.* at 480. Similarly, in *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 592 F.2d 762, 764 (4th Cir. 1979), the court found that a condition is permanent when it is chronic and there is no evidence of recovery within a normal healing period. *Id.* at 764.

In line with the precedent established by *Watson* and the cases that have implemented its approach to permanency, the Claimant's condition in the case at issue can be considered permanent. Although the Claimant has undergone a wide variety of medical treatments that have led to periods of improvement, such medical treatments have been intended to help correct a continuously worsening condition. Dr. Linovitz, the orthopedic surgeon and spine specialist who has treated the Claimant for approximately 15 years, testified that the Claimant's condition has not improved since the day Dr. Linovitz first saw him, July 6, 1988, but instead has declined. (CX 24, p. 6-11.)

On the first evaluation on July 6, 1988, Dr. Linovitz found the Claimant to be asymptomatic. (CX 2, p. 97.) However, as evidenced in the volumes of medical records cited in this decision and in the examples listed below, the Claimant's overall condition continued to worsen from that point onward.

Complete Block

Approximately ten days after the Claimant's initial appointment with Dr. Linovitz, a myelogram ordered in response to the Claimant's onset of pain, showed the Claimant to have a complete block at L1-2 and narrowing disc space. (CX 2, p. 92.)

Wire Cutting into Spinal Column

On August 9, 1988, after finding that the screws and bailing wire in the Claimant's back had slipped so that the wire was cutting into the Claimant's spinal column, Dr. Linovitz performed a surgery on the Claimant, removing the Harrington-Luque instrumentation from his back and inserting a cerebrospinal fluid shunt. (CX 2, v. 1, p. 100.)

Arachnoiditis

Following the August 9, 1988, surgery, Dr. Linovitz diagnosed the Claimant with arachnoiditis, a condition that has no cure. (CX 2, p. 100.)

Scoliosis

X-rays taken on September 30, 1988, showed persistent post-traumatic scoliosis of 15 degrees (CX 2, p.77), which worsened by June 1, 1989, to scoliosis of 32 degrees. (EX 19, p. 996.) Dr. Linovitz also discovered at that time that the Claimant had developed an established pseudoarthrosis at L1-2 with progressive lateral listhesis (CX 2, p. 58.)

Dysesthesias

On June 8, 1995, Dr. Linovitz explained that the Claimant had "constant moderate discomfort in his back and lower extremities with *worsening* intermittent discomfort and dysesthesias involving his anal region and leg." (CX 2, p. 36.)

Worsening Dysesthesias

On February 13, 1997, the discomfort and dysesthesias involving the Claimant's anal region and leg worsened and the Claimant suffered tingling and burning sensations down his left leg. (HT, p. 116.)

Hepatitis C

In 1997, Dr. Hassanein did a liver biopsy and found the Claimant to carry the Hepatitis C virus. (CX 5, p. 196.)

Although Respondents have cited medical records that indicate the Claimant's condition improved to some extent between July 14, 1989 and January 27, 1993, the period of improvement was related to specific symptoms and was short-lived. However, as indicated above, the Claimant's physical condition continued to worsen after his improvement period, with the onset of dysesthesias as well as his contraction of the Hepatitis C virus.

In addition to his worsening physical condition, the Claimant also showed signs of mental impairment after the improvement period. In early February 1993, it was discovered that the Claimant suffered a post-traumatic psychiatric condition (CX 8, p. 211) amounting to an organic mental disorder. (CX 1, p. 6.) Then, from 1993 until 2003, further psychological and psychiatric evaluations showed the Claimant to suffer a mild cognitive deficit, a mood and anxiety disorder, (CX 20, p. 551-52), and a dysthymic disorder. (CX 1, p. 4; CX 7, p. 206.) In other words, despite the fact that the Claimant showed improvement in certain areas physically, between 1989 and 1993, medical records from that point onward illustrate the Claimant's worsening physical condition and newly discovered mental condition.

Dr. Linovitz's Permanent and Stationary Recommendations Are Valid

Respondents argue that because Dr. Linovitz has changed his opinion with regard to the Claimant's permanent and stationary status, his testimony is not credible. They assert that he stated in his June 8, 1995 medical report that the Claimant's condition had reached maximum medical improvement, but that in his deposition he claimed that the Claimant's condition had not improved since the day Dr. Linovitz first saw him, July 6, 1988. (CX 24, p. 6-11.)

A close review of Dr. Linovitz's explanations shows that he did not contradict himself in his permanent and stationary opinions. On June 5, 1995, Stephanie Judice of Crawford & Company, sent correspondence to Dr. Linovitz requesting that he issue a report addressing three issues, including the following issue: "Is Mr. Heavin considered Permanent and Stationary with regards to his spine and right lower extremity?" (CX 2, p. 38.) On June 8, 1995, after examining the Claimant, Dr. Linovitz sent a response to Ms. Judice wherein he answered her question as follows: "Discussion and Recommendations: It is my opinion that Mr. Heavin is permanent and stationary regarding his injuries of October 13, 1986."

At his deposition, Dr. Linovitz explained that he issued the permanent and stationary report dated June 8, 1995, based on his understanding according to California workers'

compensation law. (CX 24, p. 29.) However, he explained, in applying a retrospectroscope and with the value of hindsight, as done in longshore matters, he finds that the Claimant was "destined never to improve I think from the day of the injury, or certainly by January 18th of 1988." (CX 24, p. 29.)

A retrospective approach can be used to determine the date of permanency, *Walsh v. Vappi Construction Co.,* 13 BRBS 442 (1981), and is appropriate in this case. Although Dr. Linovitz suggested various dates for the Claimant's permanent and stationary status, he was competent in his findings as he explained the approach he used in each instance.[7] As explained earlier in this decision, the Claimant's condition never improved from the day he first was seen by Dr. Linovitz, on July 6, 1988, but instead has continued to worsen, only improving for short periods. Therefore, I find the Claimant's permanent and stationary status began on July 6, 1988.

Lack of Worsening Condition Does Not Affect Date of Maximum Medical Improvement

Respondents argue that the X-rays and myelograms taken of the Claimant's lumbosacral spine on June 8, 1995 and February 13, 1997 did not evidence any change, and therefore failed to show a worsening of the Claimant's condition. However, Dr. Linovitz testified in his deposition that the repeat myelogram did not show any worsening of the Claimant's condition because the Claimant suffers from a complete block, a condition that cannot get any worse. (CX 24, p. 43.) He explained "It's like saying you're dead, how much worse can you get than that? I mean, the guy's got a complete block. How much worse? There is no worse." (CX 24, p. 43.) More importantly, in determining maximum medical improvement (MMI), the relevant inquiry is whether the Claimant has *improved,* and the fact that the X-rays and myelograms failed to show any change is evidence that no improvement took place.

Varying Ratios of Pain, Numbness and Tingling Do Not Affect Maximum Medical Improvement

Respondents argue that the "pain diagrams" executed by the Claimant at the office of Dr. Linovitz on June 8, 1995 and February 13, 1997 illustrate decreased orthopedic complaints thereby showing an improvement in the Claimant's condition. However, there is no evidence in support of such a finding. In fact, during Dr. Linovitz's deposition, Mr. Aleccia commented on the "pain" diagrams as follows: "when I look at these two pain diagrams executed by your patient, it would appear to me that at best they are equal." (CX 24, p. 40.) The statement by respondents' counsel concedes that there is not any significant illustration of improvement from the 1995 diagram to the 1997 diagram. Further, a close examination of the exhibits reveals that the Claimant placed between 32 and 34 markings indicating pain and/or numbness and tingling on each of the diagrams. (EX 19, p. 889, 897.)

Although the Claimant's pain diagrams indicate that overall, his pain, numbness and tingling persisted from 1995 to 1997, the 1997 diagram illustrates a higher showing of numbness and tingling markings than pain markings. (EX 19, p. 889, 897.) As a result, Respondents claim

[7] Dr. Linovitz additionally referred to the permanent and stationary dates of October 13, 1986, and January 18, 1988. However, because he was not the Claimant's treating doctor at those times, he does not have as strong a basis to demonstrate that the Claimant was permanent and stationary on either of those dates.

that the diagrams are evidence that the Claimant's pain decreased. However, Dr. Linovitz explained at his deposition that, contrary to Respondents' belief, pain diagrams are not indicative of pain intensity (as there are no instructions for a patient to "put more x's" to show more pain), but instead are used to identify pain location. (CX 24, p. 39.)

The Opinion of Claimant's Treating Physician Should Be Given Great Weight

The Ninth Circuit held in *Amos v. Director,* OWCP, 153 F.3d 1051 (9th Cir. 1998), (order revised at 164 F.3d 480 (9th Cir. 1999)), that a treating physician's opinion is entitled to substantial weight. In a very recent decision, *Peabody Coal Co. v. Director*, OWCP, No. 00-0752 BLA (6th Cir. 2003), the Sixth Circuit added that although treating physicians get the deference they deserve based on their power to persuade, "a highly qualified treating physician who has lengthy experience with a [patient] may deserve tremendous deference…" *Id.* (quoting Eastover Mining, 2003 WL 21756342, at 7.) The court then referred to the claimant's 16 years of treatment by his treating doctor, finding that the doctor's opinion was well supported by his ongoing treatment of the claimant and well documented treatment notes. *Peabody Coal Co. v. Director*, OWCP, No. 00-0752 BLA (6th Cir. 2003).

In the same regard, Dr. Linovitz's opinion that the Claimant is permanently totally disabled should be given substantial weight. Dr. Linovitz has treated the Claimant for more than 10 years, has maintained well documented treatment notes, and has presented persuasive testimony of the Claimant's condition. Moreover, Dr. Linovitz is an orthopedic surgeon specializing in spinal disorders. In addition, Dr. Linovitz testified that based on his 25 years of experience and more than 10 years of treating the Claimant, there is no chance that the Claimant was feigning his condition. (CX 24, p. 24.) Because of Dr. Linovitz's extensive experience in the field of orthopedic surgery and his history in treating the Claimant, his findings may be given greater weight than the findings of doctors who only examined or treated the Claimant a handful of times.

2. What is the Nature and Extent of the Claimant's Disability?

Nature

Disability is generally addressed in terms of whether its nature is permanent or temporary and whether its extent is partial or total. With regard to nature, the Act defines disability as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902 (10). Therefore, a claimant must demonstrate an economic loss in conjunction with a physical or psychological impairment in order to receive a disability award. *Sproull v. Stevedoring Service of America,* 25 BRBS 100, 110 (1991).

As discussed in detail above, the Claimant's condition has reached a level of permanency. A condition is permanent if it has continued for a lengthy or indefinite duration *Crum v. General Adjustment Bureau,* 738 F2d 474, 480 (D.C. Cir. 1984), or when it is chronic and there is no evidence of recovery within a normal healing period. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP,* 592 F.2d 762, 764 (4th Cir. 1979). Because the Claimant's complex medical condition has continued for a period exceeding 15 years and

because he also suffers from arachnoiditis, a chronic inflammation and thickening of the arachnoid layer, I find the Claimant's disability has achieved permanent status.

Extent

With regard to whether a disability is partial or total, where it is uncontroverted that a claimant cannot return to his usual work, he has established a *prima facie* case of total disability, and the burden shifts to the employer to establish the availability of suitable alternative employment. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). To do so, the employer must show the existence of realistic job opportunities which the claimant is capable of performing, considering his age, education, work experience, and physical and mental restrictions. *New Orleans (Gulfwide) Stevedores v. Turner* , 661 F.2d 1031 (5th Cir. 1981). If the employer satisfies its burden, then the claimant, at most, may be partially disabled. *See, e.g., Container Stevedoring Co. v. Director OWCP*, 935 F.2d 1544 (9th Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

The claimant can rebut the employer's showing of the availability of suitable alternate employment, and retain eligibility for total disability benefits, if he shows he diligently pursued alternate employment opportunities but was unable to secure a position. *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540 (4th Cir. 1988); *Roger's Terminal & Shipping Corp. v. Director, OWCP* , 784 F.2d 687 (5th Cir.), *cert. denied*, 479 U.S. 826 (1986). However, the claimant's diligence in pursuing employment is only relevant after the employer satisfies its burden of establishing the availability of suitable alternate employment. *Roger's Terminal*, 784 F.2d at 687.

In this case, the parties agreed that the Claimant was unable to return to his previous line of work.[8] Therefore, it became the Employer's burden to establish the availability of suitable alternative employment for the Claimant. After reviewing labor market surveys, medical reports indicating both the Claimant's physical and psychological impairments, and extensive vocational testing results of the Claimant's performance capabilities, it is clear that the Employer was unable to meet its burden. Therefore, based on the Claimant's *combined* physical and psychological injuries, he is rendered totally disabled.

In determining the Claimant's permanent total disability status, vocational evaluations, labor surveys, psychologist and psychiatrist reports, and medical records relating to the Claimant's physical injuries, were all considered. Overwhelmingly, the evidence showed that the Claimant is not suited to compete in the job market.

Vocational Testing

From January 22, 2003 through January 24, 2003, vocational consultant Thomas Yankowski evaluated the Claimant to determine his employment capability (CX 19, p. 502) by means of a Functional Capacity Evaluation. (CX 19, p. 518A.) Mr. Yankowski conducted a

[8] Additionally, in a letter to the Claimant from Dr. Pusateri, the doctor wrote, "It is my sincere feeling that any employer who would allow you within 100 miles of an oil rig would be bordering on insanity." (CX 9, p. 215.)

series of tests on the Claimant, in a simulated work environment, and found that the Claimant: could lift a maximum of 10 pounds from the knee level up, but could not lift any weight from the floor level; had limited range of motion of the trunk and limitations in bending and stooping; needed to hold onto furniture when standing for an extended period of time; and limped while walking. (HT, p. 313.) Following the first day of Mr. Yankowski's testing, the Claimant reported that he had chills, headaches, dry heaves and was lightheaded and weak. (HT, p. 473.) According to the Claimant, when he pushes himself a little farther than his normal daily activities, he experiences this type of pain reaction. (HT, p. 519.)

Mr. Yankowski also tested the Claimant's ability to perform sedentary work and found that the Claimant had very low stamina, body mechanic breakdowns, and needed rest breaks at least every hour. (HT, p. 314.) The testing indicated that the Claimant's stamina would not be able to maintain constant standing and sitting for sedentary work. (HT, p. 326.) In fact, at the end of the three-day testing, the Claimant was in an extreme amount of pain. (HT, p. 315.) The Claimant's reaction to the simulated testing was a good example of how he would be affected if placed in a real job. As indicated by Respondents' expert witnesses, Dr. London and Dr. Furst, testing in a simulated work environment is a method of determining a claimant's level of functioning and may provide more information than a single evaluation. (EX 24, p. 38; EX 27, p. 64.)

Mr. Yankowski's testing also revealed that the Claimant has a low temperament for working with the public, (HT, p. 332), is unable to concentrate or follow multi-step instructions (HT, p. 325), is impaired with regard to new learning (HT, p. 325), and suffers from dyslexia and learning disabilities in the areas of spelling[9] and writing. (CX 19, p. 511.)

When Mr. Yankowski was asked whether the Claimant was capable of undermining the vocational testing process, he replied that in his 30 years of testing, no person has had the level of sophistication needed to manipulate test results. (HT, p. 386.) Mr. Yankowski further explained that his tests have integrity checks to identify persons who are faking their disability. The test results are evaluated to see if the patient's problems are consistent with the patient's medical problems and he found that the Claimant had difficulty performing tasks he was expected to have difficulty with and was able to perform without difficulty those tasks that were not affected by his medical problems. He found the Claimant's difficulties were consistent with the problems they expected him to have. He explained that someone who was faking the test results would not know which tests were important to the overall outcome. (HT, p. 359.) Thus, Mr. Yankowski's testing results are a credible source of the Claimant's capacity.

After reviewing the results from all of his testing, Mr. Yankowski concluded that the Claimant was not competitively employable and explained his conclusion was based on: "… my review of his numerous physical limitations, my review through medical reports, my own review of his functional capacities, my review of the psychological reports, the neuropsychological evaluations that have been done, my review of his employment history and my vocational testing results." (HT, p. 326; CX 19, p. 516.)

[9] Mr. Yankowski's testing indicated that the Claimant's spelling ability was at the third grade level. (HT, p. 336.)

Crawford & Company scheduled a Vocational Assessment of the Claimant on November of 1995, by David Janus, a Vocational Supervisor (EX 15, p. 576-82) and a Vocational Assessment Update more recently, on July 16, 2001, by Connie Guillory, a Vocational Consultant (EX 15, p. 536-44.) In her report of 2001, Ms. Guillory arrived at many of the same results as David Janus did in 1995. Ms. Guillory found that the Claimant was able to think clearly and analytically (EX 15, p. 542), but was only able to stand for an half hour period (EX 15, p. 537), could only type 13 words per minute (HT, p. 627) and had below-average dexterity. (HT, p. 684-85.) In fact, Ms. Guillory's test results also showed parallels with the results of Mr. Yankowski's testing, and indicated that the Claimant's language usage, numerical aptitudes, and attention to clerical detail were all below average. (HT, p. 332.)

The Claimant's limitations, noted during vocational testing, were determined without consideration of his psychological limitations. Still, however, the results demonstrated that the Claimant suffers from a multitude of impairments.

Labor Market Results

Lindsey Matz, a vocational consultant for Crawford & Company, conducted two labor market surveys in the fields of data entry and customer service. (EX 15, p. 549.) These areas were chosen based on the Claimant's physical restrictions, capabilities, prior work history and transferable skills. (CX 15, p. 549.) The labor market surveys did not take into consideration the Claimant's psychological limitations, however. In fact, it was not the first time that the Claimant's psychological condition was overlooked. At trial, Respondents' counsel stipulated that neither David Janus, Lindsey Matz, nor Connie Guillory reviewed or considered the reports of Dr. Sara G. Arroyo on July 14, 1993, Dr. Stanley Terman on July 20, 1993, or Dr. Perosio on February 2, 1993 (HT, p. 644-47), the psychology and psychiatry specialists whose opinions formed the basis of the Social Security Administration's decision entitling the Claimant to disability benefits in 1994. (CX 1, p. 1-7.) This lack of consideration of the Claimant's mental disability, a significant aspect of the Claimant's background, greatly discredits the findings of Crawford & Company. However, that aside, there are still numerous inconsistencies in the findings presented by Crawford & Company.

Connie Guillory testified as to the accuracy of the labor market surveys conducted by Ms. Matz in December 1999, (EX 15, p. 549) and Mr. Janus in December 1995. (EX 15, p. 557.) However, despite her testimony, the evidence clearly demonstrates that the Claimant, due to his condition, would be unable to perform, let alone obtain, many of the jobs identified for him in the surveys. For example, Ms. Guillory, after admitting that the Claimant was well documented as a poor speller, believed that he would be a good candidate for a position that listed the following requirement: "Must be a good speller." (EX, p. 551; HT, p. 612-13.) In addition, some of the potential positions listed were for employers that had no job openings available at the time of the survey. (EX 15, p. 549, 551, 552.) As identified below, almost all of the jobs listed as options for the Claimant required skills, experience or physical demands beyond the Claimant's capabilities.

Customer Service Agent

The customer service positions listed in Lindsey Matz's survey required six to eight hours of prolonged sitting, (EX 15, p. 549), which is beyond the capability of the Claimant (HT, p. 336.) Mr. Yankowski commented that customer service positions generally require computer literacy, attention to clerical detail, numerical abilities, typing skills and multi-tasking (HT, p. 336) but that the Claimant is not computer literate[10], does not have the capacity to pay attention to clerical detail, has weak numerical abilities (HT, p. 336), and can type only 13 words per minute (HT, p. 321.) Additionally, Respondents' expert psychologist, Dr. Furst, tested the Claimant's ability to focus attention and found the Claimant to score in only the first percentile on the test. (EX 27, p. 22.) Therefore, a customer service agent position would not be suitable for the Claimant.

Data Entry Worker

Ms. Guillory testified that the Claimant would be suited for a data entry position that required a multi-task oriented person with good communication skills, and stated a preference for knowledge of pharmaceutical terminology. (EX 15, p. 553; HT, p. 621) Because the Claimant has problems with multi-tasking and has no pharmaceutical knowledge, the position listed should not have been chosen as a potential opening for the Claimant. Ms. Guillory further testified that, despite the fact that the Claimant can only type 13 words per minute and has no phone experience, that he would be eligible for a data entry job that required him to be a good typist and listed a preference for one year of experience on the phone (EX 15, p. 553; HT, p. 627-28.) In fact, she responded "I am sure it would not be a problem." (HT, p. 628.)

Assembly Position

According to Mr. Yankowski, under a Department of Labor analysis, a worker must be at least in the highest third of capabilities for finger dexterity to be hired for an assembly job. (HT, p. 337.) More specifically, an assembly worker must have very fast finger manipulation. (HT, p. 337.) Both Mr. Yankowski's testing and the testing of Crawford & Company indicated that the Claimant's dexterity ranged below average due to his below average arm-hand steadiness. (HT, p. 337-38.) In fact, Connie Guillory stated that the Claimant's testing scores for manual dexterity were very low. (HT, p. 688.)

Collections Agent, Telemarketer, Front Desk Concierge, Information Clerk

These positions require dealing with the public, influencing people and making judgments, which, according to Dr. Addario, would be problematic for the Claimant. (HT, p. 332.) The Claimant expressed disgust for the positions of collections agent and telemarketer and claimed he would "go crazy" if he had to do either of those jobs. (HT, p. 338.) In addition, the Claimant felt that he would not be able to work at a front desk or information desk as he would not have the opportunity to lie down when his pain intensifies. (HT, p. 338.)

[10] The Claimant was given a computer operations test where he was asked to do formatting and various screen jumps. According to Mr. Yankowski, "it took repeated, repeated, repeated instructions with him and he still performed below average." (HT, p. 385.)

In his Labor Market Survey, Mr. Janus identified collections positions that required one year, five years, and ten years of collections experience. (EX 15, p. 558-59.) Ms. Guillory testified that, despite the fact that the Claimant has no experience in the field of collections, these jobs represented suitable alternative employment (HT, p. 638.) Ms. Guillory's failure to acknowledge that the Claimant would be unable to successfully compete for jobs requiring experience in a particular area, undermines her credibility.

Cashier

Mr. Yankowski testified that, in addition to the Claimant's limitations in terms of dealing with the public, his potential to make errors with money in a cashiering position would not be tolerated by an employer. (HT, p. 332.) Mr. Yankowski further explained the unlikelihood of the Claimant's success in this kind of job given his learning disability and his cognitive and emotional deficits. (HT, p. 333.)

PBX Operator

Mr. Yankowski explained that the position of PBX Operator requires a worker to constantly deal with multi-tasking because numerous people call at once. The worker needs to be able to take good messages, something that would be a challenge for the Claimant because of his poor spelling capabilities. (HT, p. 335.)

Parking Garage Attendant

Mr. Yankowski explained his concern regarding the placement of the Claimant as a parking garage attendant. In this position, the Claimant would not be able to take frequent breaks to use the bathroom, which would be necessary, as the Claimant has an incontinence problem. (HT, p. 365; CX 2, p. 32 .)

In summary, Mr. Yankowski found that the Claimant does not possess the necessary skills to perform the clerical jobs identified by Crawford & Company, such as cashier, telemarketer, bill collector, front desk concierge, information clerk, or PBX operator. (HT, p. 331-32.) In addition, the evidence shows that the Claimant is not capable of holding customer service or data entry positions. Mr. Yankowski's findings simply affirm the 1994 decision of the Social Security Administration, which held that the Claimant was unemployable. "Considering his maximum sustained work capability, age, education, and work experience, there are no other jobs the claimant is capable of performing which exist in significant numbers in the national economy." (CX 1, p. 6.)

Psychologist/Psychiatrist Opinions

When Dr. Addario was contacted by Crawford & Company with a list of potential jobs and job descriptions for the Claimant, Dr. Addario responded that, based on his June 25, 1997 evaluation of the Claimant's various limitations, and previous evaluations, the Claimant was not able to do any of the proposed jobs. (HT, p. 214.) His findings regarding the Claimant's

limitations were given support by other treating doctors, including Respondents' expert witnesses, as discussed below.

Dr. Addario, Dr. Wegman, Dr. Franklin and Dr. Furst all agreed that the Claimant suffers from cognitive dysfunction. Dr. Addario found the Claimant to suffer from a mild cognitive deficit. (CX 20, p. 551-52.) Dr. Wegman reported that the Claimant had evidence of a mild brain disorder and described it as "subtle cognitive impairments consistent with a postconcussive injury." (HT, p. 246.) Dr. Franklin found that the Claimant demonstrated a history of mild cognitive dysfunction. (EX 9, p. 267.) Lastly, Dr. Furst found that the Claimant suffered from neurocognitive defects (EX 10, p. 309) possibly caused by chronic pain (EX 27, p. 29), depression, traumatic brain injury, or some combination of these. (EX 27, p. 31.) In fact, when Dr. Furst tested the Claimant's mental processing speed, he noted such significant impairments at the beginning of the testing that he elected not to complete the test. (EX 27, p. 22.) In addition, it should be noted that in 2001, the Claimant's creatine level, which is a reflection of the kidney's efficiency, was 3.6 as opposed to the normal level of below 1.0 (EX 14, p. 447) and according to Dr. Addario, increased creatine levels affect cognition. (HT, p. 218.)

Dr. Addario, Dr. Franklin and Dr. Furst all found that the Claimant needed to be treated for his depressive and anxious state. Dr. Addario found the Claimant to be depressed and to suffer a mood and anxiety disorder. (HT, p. 272; CX 20, p. 551-52.) Dr. Franklin suggested a trial of antidepressant medication such as Prozac or Zoloft despite stating that the Claimant did not have a diagnosis of clinical anxiety or depression. (EX 9, p. 267-68; 284.) Dr. Furst stated that the Claimant had a significant level of depression and anxiety (EX 10, p. 306) and recommended the Claimant be given authorization for psychological treatment for his "ongoing depressive disorder." (EX 10, p. 308; CX 14, p. 232.)

Dr. Addario, Dr. Furst and Dr. Linovitz all found that the Claimant underreported his depression. (HT, p. 258; EX 27, p. 61; CX 24, p. 15.) In fact, the Claimant himself did not initiate psychiatric treatment, but rather, Dr. Linovitz referred the Claimant to Dr. Addario because he felt that the Claimant was depressed. (CX 24, p. 15.) Dr. Addario explained that it is not uncommon for patients to understate their depression because they are often in denial or do not recognize the depression. (HT, p. 289-90.)

Dr. Franklin offered, strictly from a psychiatric standpoint, that the Claimant could participate in the open labor market. (EX 26, p. 46.) However, the Claimant's capabilities for employment *cannot* be evaluated strictly on the basis of one of his ailments. As Respondents' witness, Dr. Grodan, indicated, in order to determine if a person can compete in the labor market, the totality of the person has to be considered. (EX 25, p. 31.)

Dr. Franklin reported that the Claimant suffers chronic pain and that he does not exaggerate its extent. (EX 9, p. 265; EX 26, p. 72.) In fact, Dr. Linovitz found that on a pain scale of one to ten, the Claimant's pain level is a ten. (CX 24, p. 12-13.) However, despite Dr. Franklin's knowledge of the Claimant's severe pain and despite his admission that people who experience chronic and severe pain develop psychiatric reactions as a secondary result (EX 26, p. 82), he still failed to factor the Claimant's pain into his assessment of the Claimant's capabilities. (EX 26, p. 77.)

As illustrated above, the Claimant's and Respondents' expert witnesses agreed that the Claimant suffers from cognitive dysfunction, physical pain, psychological and psychiatric impairments including depression. Because these impairments are considerable in measure, they should have been included in the analysis of the Claimant's work-related capabilities.

Respondents also attempted to show that the Claimant was capable of working because he volunteered on yachts in the Louis Vuitton Cup and the America's Cup races. (HT, 433-39.) However, the Claimant testified that the crew on each of the yachts knew his limitations and assigned him "little" jobs. (HT, p. 438.) The Claimant also testified "I love the water… when I'm on sailboats I feel better than when I'm on land." (HT, p. 441.) Respondents' expert psychiatrist, Dr. Franklin, who also had experience in sailing, was asked to give his opinion of the atmosphere on a sail boat. He responded: "It is the most relaxing thing in the world. Every time I go out on a boat I say if people discovered sailing psychiatrists would be out of business." (EX 26, p. 42.) Dr. Franklin's opinion supports the Claimant's contention that his sailing trips were a form of relaxation rather than an indication that he can be gainfully employed.

Because it was uncontroverted that the Claimant could not return to his usual work, the Employer in this case had the burden of showing the existence of realistic job opportunities within the Claimant's capabilities, considering his age, education, work experience, and physical and mental restrictions. *New Orleans (Gulfwide) Stevedores v. Turner* , 661 F.2d 1031 (5th Cir. 1981); *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Although Crawford & Company, the employer's carrier, attempted to demonstrate the availability of suitable alternative employment, it was unable to meet the burden. *See Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92 (1991), *aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993). Therefore, I find the Claimant's disability is total.

Even if the Employer had been able to meet its burden by identifying suitable alternative employment, the Claimant's disability would still be classified as total. Dr. Linovitz, the Claimant's treating orthopedic surgeon, and Dr. Addario, the Claimant's psychiatrist, both found that, considering the combination of the Claimant's psychiatric condition, orthopedic and internal medicine injuries, metabolic factors and pain disorders, the Claimant is totally disabled. (HT, p. 115, 214, 245; X 2, p. 32-33; CX 20, p. 551.) As discussed earlier, as an orthopedic surgeon specializing in spinal disorders who has treated the Claimant for 10 years, Dr.Linovitz's opinion is entitled to deference.

Additionally, the Claimant was totally disabled from March 13, 1998 to March 15, 1999, while he underwent Interferon treatment. Dr. Grodan, an internist and cardiologist, expressed the opinion that the Claimant was disabled from the competitive work environment during his Interferon treatments. (EX 25, p. 47.) Further, Dr. Addario stated that many patients on Interferon "have to go on total disability." (HT, p. 218.)

3. What Was The Claimant's Average Weekly Wage (AWW)?

Sections 10(a), 10(b) and 10(c) of the Act set forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to

Section 10(d), to arrive at an average weekly wage. 33 U.S.C. §§ 910. The first method, found in Section 10(a), applies to an employee who has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. *Mulcare v. E.C. Ernst, Inc.*, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, *i.e.*, whether it is intermittent or permanent, *Eleazar v. General Dynamics Corp.*, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, *O'Connor v. Jeffboat, Inc.*, 8 BRBS 290, 292 (1978).

Where Section 10(a) is inapplicable, application of Section 10(b) must be explored before resorting to application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year" (within the meaning of Section 10(a)), prior to his injury. 33 U.S.C. §§ 910(b); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 25 BRBS 26 (CRT) (5th Cir.1991); *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d1336, 1342 (9th Cir. 1982), *vac'd in part on other grounds*, 462 U.S. 1101 (1983); *Duncan v. Washington Metro. Area Transit Auth.*, 24 BRBS 133, 136 (1990); *Lozupone v. Lozupone & Sons*, 12 BRBS 148, 153 (1979).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. *See National Steel & Shipbuilding Co. v. Bonner*, 600 F.2d 1288 (9th Cir. 1979); *Gilliam v. Addison Crane Company*, 21 BRBS 91, 93 (1987). More specifically, the use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). *See generally Turney v. Bethlehem Steel Corporation*, 17 BRBS 232, 237 (1985); *Cioffi v. Bethlehem Steel Corp.*, 15 BRBS 201 (1982); *Holmes v. Tampa Ship Repair and Dry Dock Co.*, 8 BRBS 455 (1978); *McDonough v. General Dynamics Corp.*, 8 BRBS 303 (1978). Section 10(c) mandates that a sum which "shall reasonably represent the…earning capacity of the injured employee" be determined. The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. *Hastings v. Earth Satellite Corp.*, 628 F.2d. 85 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 905 (1980); *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981). In the case at issue, Section 10(c) applies because it is the Claimant's unrebutted testimony[11] that he received a pay increase shortly before he was injured on October 13, 1986. (HT, p. 92-93.)

A calculation of average weekly wages may be based on a claimant's income tax records. *Mattera v. M/V Marie Antoinette Pacific King, Inc.,* 20 BRBS 43 (1987). In this case, the Claimant's W-2 forms for 1986 support his testimony and show that he was paid a lower salary from January 1, 1986 to June 30, 1986, than he was paid from July 1, 1986 to October 13, 1986. (CX 15, p. 267-68.) The Claimant received two sets of W-2s in 1986, as a result of the merger of Gulf Oil and Chevron. (HT, p. 95.) The first W-2, from Gulf Oil for January 1, 1986 to June 30,

[11] The Employer attempted to introduce Exhibit 21, a Salary Action History chart, to rebut the Claimant's testimony regarding his wages. However, the Exhibit was excluded when the Employer was unable to authenticate it, and it was determined that the chart only showed "anticipated earnings," based on the hours that an employee was *expected* to work (EX. 28, p. 20), instead of the employee's actual earnings. (EX. 28, p. 21.)

1986, reflected earnings of $19,715.39 for 26 weeks of work. (CX 15, p. 268.) This amounts to weekly wages of $758.28 for that time period. The second W-2, from Chevron for July 1, 1986 to October 13, 1986, reflected earnings of $15,144.44 for only 15 weeks of work. (CX 15, p. 268.) This amounts to weekly wages of $1,009.63.

As illustrated by the Claimant's two W-2 forms for 1986 (CX 15, p. 267-68), and explained above, the Claimant received an increase in salary from $758.28 to $1,009.63 per week before his injury. The evidence that he indeed received a salary increase corroborates his testimony that he was promoted from "pumper gauger" to "facility operator" shortly after Gulf Oil merged with Chevron. (HT, p. 90-91.)

As noted above, a Section 10(c) computation should reflect a pay raise received shortly before a claimant's injury. *Mijangos v. Avondale Shipyards*, 19 BRBS 15 (1986); *Le v. Sioux City & New Orleans Terminal Corp.,* 18 BRBS 175, 177 (1986). Because the Claimant is able to support his contention that he received a pay increase shortly before his injury on October 13, 1986, and because Respondents did not successfully present a rebuttal, Section 10(c) applies and the Claimant's average weekly wage from Chevron of $1,009.63 is to be used in calculating his benefits.

4. Is the Employer entitled to Section 8(f) relief?

Under Section 8(f) of the Act, an employer may limit its liability for payment of permanent disability to 104 weeks compensation if three elements are present:

(1) The injured worker had an existing permanent partial disability before the most recent injury;

(2) The injured worker's existing permanent partial disability was manifest to the employer before the most recent injury; and

(3) Depending on whether the present disability is total or partial,

  (a) if the present permanent disability is total, it is not due solely to the most recent injury; or

  (b) if the present permanent disability is partial, it is materially and substantially greater than that which would have resulted from the most recent injury alone without the contribution of the pre-existing permanent partial disability.

33 U.S.C. § 908(f); *Lockheed Shipbuilding v. Director, OWCP*, 25 BRBS 85, 87 (CRT) (9th Cir. 1991); *see Director, OWCP v. Newport News Shipbldg. & Dry Dock Co.* (*Carmines*)*,* 138 F.3d at 138-39.

The Respondents in this case submitted an application for 8(f) relief to the Office of Workers' Compensation Programs, dated March 27, 1998. (EX 5, p. 8-15.) The District Director denied the application in a letter dated May 7, 1998, but explained that the application met the first and second elements above, thus establishing 1) that the claimant had a pre-existing

permanent impairment and 2) that the pre-existing impairment was manifest to the employer. (EX 6, p. 165.) The letter further clarified that the 8(f) application was denied solely because the contribution element had not been met. (EX 6, p. 165.) Then, in an amended application for 8(f) relief dated April 21, 1999, the Respondents again unsuccessfully attempted to obtain relief from the Special Fund. (EX 5, p. 16-164.) The District Director's May 27, 1999 letter denying the Employer's amended 8(f) application again explained that the contribution element had not been met as the employer failed to show the extent the Claimant's condition was worsened by his pre-existing impairment. (EX 6, p. 168.)

Lack of Contribution to the Ultimate Permanent Total Disability

There are two aspects to the contribution element. First, if the present permanent disability is total, the employer must establish that the claimant's ultimate disability is not due solely to the subsequent injury. 20 C.F.R. § 702.321(a)(1)(iv). In interpreting this requirement, the courts have held that even if a claimant's pre-existing disability combined with a work-related injury to create a greater disability than the work-related injury would have caused by itself, 8(f) relief is still precluded if the work-related injury alone would have been totally disabling. *FMC Corp. v. Director, OWCP*, 886 F.2d 1185 (9th Cir. 1989); *Director, OWCP v. Luccitelli*, 964 F.2d 1303 (2nd Cir. 1992); *Two "R" Drilling Co. v. Director, OWCP*, 894 F.2d 748 (5th Cir. 1990).

Second, when an ultimate permanent disability is only partial, the employer must establish that the disability is materially and substantially greater than the disability that would have resulted from the subsequent injury alone. 20 C.F.R. §702.321(a)(1). In order to determine whether this requirement has been satisfied, a fact finder must consider what level of disability would have resulted from a claimant's work-related injury if the claimant had not already had a pre-existing disability at the time of the injury. *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.,* 8 F.3d 175, 185 (4th Cir. 1993).

Because the Claimant has a permanent total disability, it was the Employer's burden to establish that the Claimant's disability was not due solely to the second injury. 20 C.F.R. § 702.321(a)(1)(iv). Although the Employer attempted to prove that the Claimant's pre-existing ailments contributed to his permanent total disability, it failed to do so and presented less than persuasive medical records and testimony.

Respondents referred to medical records showing that on February 2, 1982, the Claimant was treated at Lafayette General Hospital in Lafayette, Louisiana for back pain. (EX 7, p. 189.) The medical reports indicated that the Claimant had a five-year history of back pain (EX 5, p. 31; EX 17, p. 657-68), but showed that the back pain could be related to the Claimant's urinary and kidney problems. (EX 17, p. 657-59, 663-65, 667.) Nothing in the medical records indicated that the Claimant's back pain contributed to the disability he currently suffers as a result of the October 13, 1986 injury. In fact, after treating the Claimant on February 19, 1987, Dr. Blanda issued a medical report which referred to the Claimant's past back pain. He wrote, "I had an incident of seeing him several years ago, apparently when he came in for back pain, but as it turned out it was kidney problems." (EX 19, p. 974.) In addition, Dr. Linovitz, after reviewing the medical records, concluded that the 1982 medical record referring to "back pain," with no

follow-up treatment, was not enough to show that the Claimant suffered a pre-existing back condition. (CX 24, p. 54.) Further, Dr. Linovitz opined that the back pain seemed to have been related to the Claimant's kidney problems, but also could have been related to a sciatic nerve problem. (CX 24, p. 54.)

The Respondents also contend that the Claimant's pre-existing kidney problems are the basis for 8(f) relief. It is true that the Claimant suffered renal difficulty prior to the accident of October 13, 1986. In fact, on March 4, 1982, the Claimant saw Dr. Charles Williams, who performed surgery on his right kidney and approximately a year later, on March 7, 1983, the Claimant's right kidney was removed at Lafayette General Hospital. (EX 5, p. 39.) However, again there is no indication that the Claimant's kidney problems contributed to the Claimant's current disability status.

The Respondents' own expert witness, Dr. Grodon, testified that the removal of the Claimant's kidney prior to his October 13, 1986 injury, did not significantly contribute to his present disability. (EX 25, p. 46.) He opined that the loss of a kidney does not affect a person's day to day life. (EX 25, p. 30.) He gave the following example: "You have a perfect example of people donating a kidney for transplant, and they have one kidney left, and they live normal lives… [The Claimant] does not have a disability because of his kidneys. Even now." (EX 25, p. 30.) When asked if the Claimant's disability level would be less today if he had not had a prior nephrectomy, Dr. Grodan replied that it "would be less, but by a small increment. But it is a *tiny* increment compared to what happened to him." (EX 25, p. 46.)

In addition, Dr. Grodan issued a medical report on June 18, 2001, stating that the Claimant is not limited from the labor market by his liver or kidney disorder, but instead is limited due to his orthopedic limitations. (CX 4, p. 150.) Dr. Grodan further remarked that "Mr. Heavin, at the time of the accident, had only one kidney in his abdomen. If he had both kidney[s] present, considering the substantial trauma to his body, in my opinion, both kidneys would have been damaged, in all medical probability to an identical degree." (EX 8, 228.) Thus, even the Respondents' own expert expressed the specific opinion that the Claimant's pre-existing kidney problem played no role in the severity and extent of the Claimant's permanent condition.

However, despite Dr. Grodan's indications that Claimant's pre-existing kidney condition does not have any limiting effect on his current disability, Dr. Grodan testified in a conclusory manner that the Claimant's current medical condition and disability "is substantially greater than it would be from the October 13, 1986 injury standing alone…" (EX 25, p. 44.) This is the wrong standard for this case. That is the standard for a permanent partial disability. As mentioned above, the Claimant was permanently totally disabled. The test is whether or not the Claimant would have been permanently totally disabled by the injuries he suffered in his fall without his prior injuries. I have found that he was. Even if this was an instance of permanent partial disability, Dr. Grodan's conclusory testimony would not satisfy the Respondents' burden of proof. He did not offer any basis for this statement. Dr. Grodan's contradictory statements indicate either that he was confused by this issue, or that his true opinion was articulated in the opinions he rendered in more specific layman's terms. (EX 25, p. 46.)

Another of the Respondents' expert witnesses, Dr. London, replied "Yes," when asked whether the removal of the Claimant's right kidney would render his condition materially and

substantially greater than from the October 13, 1986 injury standing alone. Again, while this might be relevant to permanent partial disability, it does not apply to permanent total disability. Moreover, even if the "materially and substantially greater" test was appropriate in this case, Dr. London still failed to quantify how much of the current disability could be attributed to the kidney removal and back pain. (EX 24, p. 21.) This would lead to a denial of Special Fund Relief in a permanent partial case as well.

Because Respondents were unable to disprove that the Claimant's disability was due solely to the injury that occurred on October 13, 1986, the request for § 8(f) Special Fund relief is DENIED.

5. Is the Claimant entitled to reimbursement for the Interferon treatment he received?

As indicated above, the Claimant was diagnosed as suffering from Hepatitis C, as a result of his 48 blood transfusions. (CX 5, p. 196; CX 14, p. 229.) Dr. Hassanein prescribed Interferon treatment (HT, p. 138) and when the Claimant had the prescription filled, the authorization from Crawford & Company failed to go through. As a result, the Claimant paid for the prescription, in the amount of $1,976.29, on his credit card. (HT, p. 141-43; CX 16, p. 355.) When the authorization was never given, nurses at UCSD provided Interferon to the Claimant at no cost, by using Interferon that had been returned to UCSD by patients who could not tolerate Interferon. (HT, p. 143.)

According to the records of Respondents' own expert in internal medicine, Dr. Grodan, the Claimant's prescribed use of Interferon was reasonable and necessary to treat his Hepatitis C. (EX 8, p. 209; EX 25, p. 28.) As such, after one year of use, his condition showed improvement. (EX 8, p. 229.) It is clear that the Claimant is rightfully entitled to reimbursement for any monies he paid to obtain the Interferon prescription. The Claimant has presented a receipt for $1,976.29, for one month's supply of Interferon and is therefore entitled to reimbursement in that amount.

It is less clear whether the Claimant should be compensated for the *value* of the Interferon treatment he was given for a year's time. The Claimant has stated that he seeks "reimbursement" for the value of the year's supply of Interferon, but one cannot be reimbursed for something that was never paid. Because the Claimant only paid for one month of the 12-month Interferon treatment, it is not "reimbursement" that he seeks for the other 11 months. The Claimant cites the collateral source rule as a theory by which he should be able to recover the cost of 11 months of Interferon treatment, totaling $21,739.19.

Under the collateral source rule, an injured plaintiff's tort recovery is not diminished by insurance benefits he receives from sources independent of the tortfeasor's contribution. *Friedmann v. Landa*, 573 So.2d 1255 (La.App. 4th Cir. 1991); *Weir v. Gasper*, 459 So.2d 655 (La.App.4th Cir. 1984), *writ denied*, 462 So.2d 650 (La. 1985). In other words, a plaintiff's receipt of a benefit from his or her insurance company does not relieve the tortfeasor from paying for the cost of the injury. Under the collateral source rule, the plaintiff is able to collect two times – once from the insurance company and another time from the tortfeasor. The rule is intended to disallow a negligent party from benefiting from an injured person's insurance

coverage. "The collateral source rule requires a negligent party to pay the full amount of damages suffered by the injured person without credit for amounts paid to the injured person by sources independent of the negligent party." *Blythe v. University of Oklahoma*, 2003 WL 21383927 (Okla.Civ.App. Div. 2) (2003).

Since the collateral source rule has generally applied in tort cases, it is relevant that the case at hand is not based on tort, but is instead based on workers' compensation. In *Blythe*, the court held that the collateral source rule, a well-established principle of tort law, did not apply to a workers' compensation case where a claimant requested prescription reimbursement for payments made by her insurance company. *Blythe v. University of Oklahoma*, 2003 WL 21383927 (Okla.Civ.App. Div. 2) (2003). Likewise, in the workers' compensation case at issue, the collateral source rule does not apply as the Claimant is seeking compensation for a prescription that was provided to him by UCSD.

However, should UCSD ever seek payment for the 11 months of Interferon it provided to the Claimant, Respondents will be responsible for the cost and will be required to compensate the medical facility. Any other determination would allow the Respondents to benefit from their failure to provide authorization for the Claimant's Interferon treatment in a timely manner.

It is also noted that the Respondents have also failed to authorize a second Interferon treatment, recommended by Dr. Hassanein.[12] (EX 14, p. 449.) Because Respondents' expert witness in internal medicine also agreed that the Interferon treatment was beneficial to Claimant and believed a second dose would be appropriate (EX 8, p. 229), authorization for the second round of therapy should be given.

CONCLUSIONS

In conclusion, the Claimant, after sustaining injuries on October 13, 1986, while working for the Employer, reached maximum medical improvement on July 6, 1988. The Claimant's complex medical condition, which has persisted for approximately 15 years and includes chronic suffering, renders the Claimant permanently totally disabled. The Claimant's average weekly wage at the time of his injury was $1,009.63. The Employer is not entitled to Section 8(f) Special Fund relief.

The Claimant is entitled to reimbursement for the Interferon treatment he paid for, but he is not entitled to "reimbursement" for the 11 Interferon treatments he received from University of California San Diego Medical Center free of charge. However, if the Medical Center should ever seek payment for the Interferon it provided to the Claimant, Respondents will be required to provide compensation.

ORDER

Based on the findings and conclusions set forth above, it is hereby ORDERED that:

[12] Dr. Hassanein recommended a second treatment when a liver biopsy showed the Hepatitis virus as still active in the Claimant. (EX 14, p. 449.)

1. The Employer, Chevron USA, Inc. and Crawford & Company, its carrier, shall make payments to the Claimant, for temporary total disability benefits during his Interferon treatment from March 13, 1998 to March 15, 1999, based on an average weekly wage of $1,009.63 per week.

2. Chevron USA, Inc. and Crawford & Company shall make payments to the Claimant, for permanent total disability benefits for his multiple injuries, from July 6, 1988, based on an average weekly wage of $1,009.63 per week.

3. Chevron USA, Inc. and Crawford & Company shall receive credit for temporary total disability payments made to the Claimant until January 6, 1996, and for temporary partial disability payments made to the Claimant since January 6, 1996.

4. Chevron USA, Inc. and Crawford & Company shall reimburse the Claimant in the amount of $1,976.29, for the prescribed Interferon that he purchased on his credit card.

5. Chevron USA, Inc. and Crawford & Company shall pay interest on each past due unpaid compensation payment from the date the compensation became due until the date of actual payment at the rates prescribed under the provisions of 28 U.S.C. § 1961 and 33 U.S.C. § 914(e).

6. The District Director shall make all calculations necessary to carry out this order.

7. Chevron USA, Inc. and Crawford & Company shall authorize all requested medical evaluations and/or treatments relating to any of the Claimant's medical conditions referenced in this decision.

8. Chevron USA, Inc. and Crawford & Company shall authorize the Claimant's treatment for his psychological/psychiatric deficiencies, including his ongoing depressive disorder.

9. Chevron USA, Inc. and Crawford & Company shall provide compensation to University of California San Diego Medical Center for the 11 Interferon treatments it provided to the Claimant, should the Medical Center seek payment.

10. Counsel for the Claimant shall prepare and serve an Initial Petition for Fees and Costs on the undersigned and on the Respondents' counsel within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, Respondents' counsel shall initiate a verbal discussion with the Claimant's counsel in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the Claimant's counsel shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the Respondents' counsel with a Final Application for Fees and

Costs which shall incorporate any changes agreed to during his discussions with the Respondent's Counsel and shall set forth in the Final Application the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for employer shall file and serve a Statement of Final Objections. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

A

JENNIFER GEE
Administrative Law Judge